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No. 06-260

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

Kimberly J. Goodin,

Petitioner,

v.

United States Postal Inspection Service.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The Eighth Circuit held in this case that the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 601 et seq., impliedly repeals the independent grant of jurisdiction in statutes – such as the Postal Reorganization Act (PRA) – providing that governmental entities may sue or be sued in federal district court. Although the Solicitor General expressly acknowledges that the courts of appeals are divided on this important question, he contends that certiorari is nonetheless not warranted. However, each of his arguments against certiorari falls short. First, the circuit split is entrenched: the Solicitor General offers neither a reason to believe that the Ninth Circuit might "reconsider" its position nor any genuine explanation why the Eleventh Circuit's decision in *Marine Coatings of Alabama, Inc. v. United States*, 932 F.2d 1370 (1991), does not place it squarely on the same side of the split as the Ninth Circuit. Second, the recent technical amendments to the CDA do nothing to diminish the importance of the question presented, as the amendments have no substantive effect on the operation of the CDA with respect to the Postal Service or other government agencies. Third, the rule adopted by the Ninth and Eleventh Circuits is fully consistent with Congress's purpose in enacting both the CDA and the PRA. By contrast, reading into the CDA an implied repeal of the PRA's "sue and be sued" provision, passed just a few years before, is untenable given the CDA's purpose of *expanding*, rather than *limiting*, federal contractors' access to courts. Fourth, and finally, the Solicitor General's contention that petitioner's underlying contract claim is "illusory" is irrelevant to the question whether certiorari is warranted; indeed, the Solicitor General does not contend that this Court would even reach this issue on the merits. Certiorari should accordingly be granted.

1. The Solicitor General's assertion that certiorari is not warranted because the Ninth Circuit might "reconsider its position" (BIO 9) in light of the D.C. Circuit's holding in *A & S*

Council Oil Co. v. Lader, 56 F.3d 234 (1995), amounts to nothing more than unwarranted speculation.

First, the position of the Ninth Circuit is both more settled and more thoroughly reasoned than the Solicitor General contends. In *In re Liberty Construction*, 9 F.3d 800 (1993), the Ninth Circuit identified and answered the precise question the Solicitor General alleges it ignored: namely, "whether in passing the CDA Congress created an exclusive remedial scheme" (BIO 8). The government argued in that case, as it does here, that the court should "broadly interpret [the CDA] as withdrawing all district court jurisdiction over contract claims within the scope of the CDA, regardless of independent statutory grants of jurisdiction." *Liberty Construction*, 9 F.3d at 801. But the court squarely rejected such a broad construction. Instead, it held that its earlier determination that "the SBA's 'sue and be sued' provision vested jurisdiction in the district court over claims against the SBA" remained "the law of the Ninth Circuit after the enactment of the CDA and its amendment of the Tucker Act." *Id.*

In so holding, the Ninth Circuit relied in part on its earlier precedent, *North Side Lumber Co. v. Block*, 753 F.2d 1482 (1985), which in turn concluded from a close reading of the text of 28 U.S.C. § 1346(a)(2) that the CDA merely amended the jurisdictional grant of the Tucker Act and was not a general bar to contract suits in district courts. *Id.* at 1486. While the limitation in Section 1346(a)(2) uses the phrase "*any* civil action or claim" (emphasis in original), it does so only in reference to the specific jurisdictional grant of the Tucker Act – that is, over contract disputes "not exceeding $10,000." *Id.* Thus, the bar only precludes contractors from bringing "any civil action or claim" in district court for disputes "not exceeding $10,000."

In *Wright v. U.S. Postal Service*, 29 F.3d 1426, 1428-30 (1994), a case that the Solicitor General does not address at all, the Ninth Circuit subsequently reaffirmed its holdings in *Liberty Construction* and *North Side Lumber* and applied

them to the "virtually identical" "sue and be sued" jurisdictional grant in the PRA. The Ninth Circuit in *Wright* again rejected what it regarded as the "legally-incorrect premise that the CDA provides the exclusive basis for litigation of claims relating to government contracts." *Id.* at 1428. Instead, it relied on "*Liberty Construction* and the Supreme Court's admonition that the PRA's waiver of immunity be 'liberally construed' [to] hold that the CDA does not preempt" contract claims against the Postal Service. *Id.* at 1430 (quoting *Franchise Tax Bd. v. U.S. Postal Service*, 467 U.S. 512, 517 (1984)).

Second, there is no reason to believe that the Ninth Circuit will reconsider its position in light of the D.C. Circuit's decision in *A & S Council*. *Contra* BIO 8-9. To the contrary, in the years since *A & S Council*, courts in the Ninth Circuit have favorably cited that court's holding in *Liberty Construction* at least three times in published opinions. *See Kim v. Kang*, 154 F.3d 996, 999 (9th Cir. 1998); *Jet Investment, Inc. v. Department of Army*, 84 F.3d 1137, 1143 n.12 (9th Cir. 1996); *Southwest Marine, Inc. v. United States*, 926 F. Supp. 142, 146 (N.D. Cal. 1995); *see also Cadillac Fairview/California, Inc. v. Dow Chemical Co.*, Nos. 83-7996 & 83-8034, 1997 U.S. Dist. LEXIS 3083, at *42 (C.D. Cal. Feb. 19, 1997).

2. Even the slim prospect of the Ninth Circuit reversing itself en banc is rendered irrelevant by the fact that the circuit split would persist as a result of the Eleventh Circuit's holding in *Marine Coatings of Alabama, Inc. v. United States*, 932 F.2d 1370 (11th Cir. 1991). The Solicitor General's perfunctory contention that "the Eleventh Circuit has [not] taken a position on" the question presented because the statutory scheme at issue in that case was "structured quite differently than the PRA" (BIO 8 n.2) is unavailing. The Solicitor General offers no explanation why the "structure" of the Suits in Admiralty Act (SAA), 46 U.S.C. §§ 741-52, and the Public Vessels Act (PVA), 46 U.S.C. §§ 781-90, which provided the

basis for the district court jurisdiction in *Marine Coatings*, should matter at all. And indeed, it does not, as the relevant issue in *Marine Coatings* is instead the operation of the CDA and whether it "impose[s] external limits" on independent grants of jurisdiction, 932 F.2d at 1377 – viz., precisely the issue presented in this case. Significantly, the Eleventh Circuit's holding in *Marine Coatings* rests not on the precision with which Congress established district court jurisdiction under the SAA and PVA, but instead on a reluctance to read the CDA as impliedly repealing a grant of jurisdiction when to do so would "frustrate Congress's purpose" in granting that jurisdiction in the first place. *Id.*

The Solicitor General's arguments for reading the CDA to imply such a repeal of the PRA would apply equally to the SAA and PVA. That the Eleventh Circuit held that "there is no need to apply [the CDA] if another method of bringing suit is available," *id.*, leaves little doubt that it would follow the Ninth Circuit in holding that the CDA does not preclude a contract claim under a statute such as the PRA. Indeed, numerous other courts have construed *Marine Coatings* not as a case limited to the SAA and the PVA, but instead as standing – like the Ninth Circuit's decisions in *Liberty Construction* and *Wright* – for the general proposition that "the CDA does not preempt district court jurisdiction over governmental contract cases provided that the plaintiff asserts a jurisdictional ground independent of the CDA." *Pike v. U.S. Postal Service*, 886 F. Supp. 487, 489 (E.D. Pa. 1995); *see also Licata v. U.S. Postal Service*, 33 F.3d 259, 264 n.6 (3d Cir. 1994); *Eagle Fence Co. v. V.S. Electric, Inc.*, 324 F. Supp. 2d 621, 625-26 (E.D. Pa. 2004); *Dardar v. Potter*, No. 02-3802, 2004 U.S. Dist. LEXIS 3512, at *43 n.79 (E.D. La. Mar. 4, 2004); *Twin Cities Air Service, Inc. v. U.S. Postal Service*, 195 F. Supp. 2d 242, 242 (D. Me. 2002).

3. Contrary to respondent's contention (BIO 9), the January 6, 2006 amendments to the CDA have no effect on the continuing importance of the question whether the CDA

precludes the grant of district court jurisdiction under the PRA or any other independent grant of jurisdiction. Rather, taken together, the amendments merely implement Congress's decision to consolidate the majority of the various agency contract boards of appeals into a single "Civilian Board of Contract Appeals." Act of Jan. 6, 2006, Pub. L. No. 109-163, § 847, 119 Stat. 3391.

First, although the amendments delete the Postal Service from the CDA's definition of "executive agency," *see id.* § 847(d)(1)(A), that change is purely a technical one. The Act does not exempt the Postal Service from the purview of the CDA; rather, it creates a "Postal Service Board of Contract Appeals" (separate from the new Civilian Board of Contract Appeals) with "jurisdiction to decide any appeal from a decision of a contracting officer of the United States Postal Service," and makes clear that the CDA is to "apply to contract disputes before the Postal Service Board of Contract Appeals in the same manner as they apply to contract disputes before the Civilian Board." *Id.* § 847(d)(2)(B).

Second, that the amendments "expressly authorize[] contractors to appeal adverse decisions by Postal Service contracting officers to either the Court of Federal Claims or alternatively to the Postal Service Board of Contract Appeals and then to the Federal Circuit" (BIO 9) similarly has no effect on the question presented. Rather, such a technical change leaves Postal Service contractors with precisely the same options under the CDA that were available to them before the amendments – viz., go directly to the Court of Federal Claims or proceed to the agency board and then to the Federal Circuit – as well as with avenues of relief directly analogous to those that will be available after the amendments to other federal contractors. *See* 41 U.S.C. §§ 606, 607(g)(1), 609(a)(1).

4. The United States argues that the decision below is "correct" because the court of appeals "applied settled principles of statutory interpretation in determining that the CDA displaces the PRA's general sue-and-be-sued clause." BIO 4-

5. That argument ignores the petition's contention (at 12-13) that the text of the CDA indicates that it was merely intended to provide a non-exclusive avenue to federal court jurisdiction. Instead, the Solicitor General's argument rests primarily on the D.C. Circuit's statement in *A & S Council* that the CDA is "the paradigm of a 'precisely drawn, detailed statute' that preempts more general jurisdictional provisions," including a "general sue-and-be-sued clause." BIO 6. But that assertion simply re-states the question that petitioner has asked this Court to resolve.

In fact, the legislative history indicates that a primary purpose of the CDA was to expand direct access to the courts for government contractors. The first "key" issue discussed in the Senate Report accompanying the CDA[1] states that the Act "would restore the contractor its right to a day in court – a fully judicialized, totally independent forum – which historically has been the forum within which contract rights and duties have been adjudicated." S. Rep. No. 95-1118, at 11 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5235, 5245. Prior to the passage of the CDA, most contractors – although not Postal Service contractors, who could file suit in district court under the PRA, *see* 39 U.S.C. § 409(a) – "were caught in an irrational patchwork system that limited their access to court, failed to provide adequate due process protections, and often resulted in substantial delays." Clarence Kipps et al., *The Contract Disputes Act: Solid Foundation, Magnificent System*, 28 PUB. CONT. L.J. 585, 587 (1999) (article co-author was a co-sponsor of the House bill). In response to this ad hoc system, "Congress created the Commission on Government Procurement in 1969 to study the procurement process." 1978 U.S.C.C.A.N. at 5238. "Direct access to court was a cornerstone of the Commission's report," Kipps et al., 28

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[1] "The House Bill was passed in lieu of the Senate Bill after amending its language to contain the text of the Senate Bill." 1978 U.S.C.C.A.N. at 5235.

PUB. CONT. L.J. at 588, and the CDA was passed to implement these recommendations.

While the Solicitor General is correct that Congress, in enacting the CDA, opted to centralize this expanded access to courts in the Court of Claims, nothing in the legislative history reflects a desire to remove existing avenues to judicial review. Rather, the decision to vest jurisdiction in the Court of Claims rested primarily on a "sensitiv[ity] to the workload pressures of the district court" and a desire to avoid "burden[ing] the district courts with direct actions." 1978 U.S.C.C.A.N. at 5244. But this concern was about *additional* claims; nothing suggests that the *existing* claims were somehow burdensome. To the contrary, as noted *supra*, a primary catalyst for the enactment of the CDA was the inability of contractors to gain any access to courts. To infer from Congress's silence in the CDA an intent to remove all Postal Service contract disputes from the district courts just a few years after massively overhauling the Postal Service "to be run more like a business than its predecessor," *Franchise Tax Bd.*, 467 U.S. at 520, including adding the provision allowing the Postal Service "to sue and be sued" in the district courts, simply reads far too much into that silence.

And the exemption of the Tennessee Valley Authority from the CDA reflects nothing more than Congress's intent to keep TVA claims out of the Court of Federal Claims. As the Senate Report indicated, "the Court of Claims is specifically excluded from jurisdiction over the TVA and the committees do not believe that this authority should change." 1978 U.S.C.C.A.N. at 5244. At the time of the CDA's enactment, the Postal Service and other quasi-governmental agencies such as the Small Business Administration were – unlike the TVA – already amenable to suit for contract disputes in both the district courts and the Court of Claims. *See, e.g.*, *Butz Engineering Corp.* v. *United States*, 499 F.2d 619 (Ct. Cl. 1974) (in case considered after enactment of PRA but before enactment of CDA, Court of Claims has jurisdiction to hear

breach of contract claims against the Postal Service). Congress's silence on this issue indicates merely that it intended to allow contract suits against the Postal Service to proceed in both courts.

5. The Solicitor General's argument that petitioner's case is an "inappropriate" vehicle to address the question presented "because the facts petitioner alleges demonstrate that no contract existed in the first place" (BIO 9-10) falls short in several respects.

First, the Solicitor General does not contend that, if certiorari were granted, this Court would actually reach (much less need to reach) the contract formation issue in the first place. Rather, such an argument would be available to respondent on remand from this Court.

Second, the district court expressly rejected a similar claim by the United States, which contended in that court that petitioner's "breach of contract claim fails as a matter of law because the USPIS regulations authorizing the issuance of rewards prohibit the creation of contractual obligations based on the submission of information in response to a reward offer." Pet. App. 10a-11a. The district court explained that although 39 C.F.R. § 233.2(b) – which provides that "[r]ewards *will* be paid up to the amounts and under the conditions stated in Poster 296, Notice of Reward" (emphasis added), which in turn indicates that "[t]he amount of any reward *will* be based on the significance of services rendered, character of the offender, risks and hazards involved, time spent, and expenses incurred" (emphasis added) – "provides some discretion in the distribution of rewards, it does not provide the clear barrier to the formation of a contractual obligation relied upon by USPIS," Pet. App. 11a.

Third, and in any event, as Section 233.2(b) makes clear, the Solicitor General's contention that "USPIS's offer to reward 'up to $50,000' for information leading to an arrest cannot constitute an implied-in-fact contract" (BIO 10) is simply

erroneous.[2] Pursuant to the regulation, USPIS promised not simply to pay a reward of up to $50,000, but also to make a reward determination based on the factors listed. It is well-established that "an obligation under a contract is not illusory if the obligated party's discretion must be exercised with reasonableness or good faith." 17A AM. JUR. 2D *Contracts* § 130 (2006). Although, as the district court recognized, USPIS retains some discretion with regard to the amount of the reward, that discretion is clearly bounded by the regulation, and the Postal Service's obligation to make a determination regarding the appropriate reward is not optional. To be sure, if this Court were to grant certiorari, rule in petitioner's favor, and remand to the lower courts for consideration of petitioner's claim on the merits, USPIS may seek to prove that a reward of zero dollars in fact satisfies its contractual obligations. Such a dispute, however, is a factual one that is neither properly resolved on a motion to dismiss nor relevant to the question whether certiorari is warranted.

CONCLUSION

For the foregoing reasons, as well as the reasons outlined in the petition, certiorari should be granted.

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[2] Notably, the Solicitor General cites only one case (and petitioner's research has revealed no others) for the proposition that providing a maximum (but no minimum) reward constitutes an illusory promise. *See Cornejo-Ortega v. United States*, 61 Fed. Cl. 371, 375-76 (2004). Indeed, the court in *Cornejo-Ortega* in turn relied primarily on two patent cases holding that the words "up to" can include zero, and on general authority holding that illusory promises are not binding. *Id.* Even if the Court of Federal Claims were correct, however, the Solicitor General's reliance on it is unavailing because, as explained above, USPIS's discretion in paying rewards is – unlike that of the FBI and DEA in *Cornejo-Ortega* – limited, which goes to the heart of the illusory promise inquiry.

Respectfully submitted,

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